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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA, New York, N.Y.  
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4 v. 08 CR 709 (DLC)

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5 MARTIN SMELING NUNEZ, a/k/a  
5 "Chicho",

6

6 Defendant.

7

7 -----x

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9 February 6, 2009  
9 2:30 p.m.

10

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11 Before:

11

12 HON. DENISE L. COTE,

12

13 District Judge

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14

14 APPEARANCES

15

15 LEV DASSIN  
16 United States Attorney for the  
16 Southern District of New York  
17 BY: TODD BLANCHE  
17 Assistant United States Attorney

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18 JOHN J. GARZON  
19 Attorney for Defendant

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1 (In open court)  
2 (Case called)  
3 THE DEPUTY CLERK: Is the government ready to  
proceed?  
4 MR. BLANCHE: Yes. Good afternoon, your Honor.  
Todd 5 Blanche for the government.  
6 THE DEPUTY CLERK: Defendant Nunez, are you ready  
to 7 proceed?  
8 MR. GARZON: Yes, your Honor. John Garzon here  
for 9 Mr. Nunez.  
10 THE COURT: Mr. Garzon, have you and your client  
11 reviewed the presentence report?  
12 MR. GARZON: Yes, we have, your Honor.  
13 THE COURT: Have you discussed it with each  
other?  
14 MR. GARZON: We have, your Honor.  
15 THE COURT: Any objections to it?  
16 MR. GARZON: We have no objections to the report,  
your 17 Honor.  
18 THE COURT: Thank you. The presentence report  
will be 19 made part of the record in this case and placed under  
seal. If 20 an appeal is taken, counsel on appeal may have access to  
the 21 sealed report without further application to this Court.  
22 This is a case in which there is a guideline,  
23 stipulation with an offense level 25 and a criminal  
history 24 category I. There is also a mandatory minimum term of  
25 imprisonment of 120 months that applies. Therefore, the  
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me 2 guidelines stipulation assumes that the defendant will be  
make 3 to qualify for the safety valve provision of the law. Let  
that 4 make that inquiry now..  
criminal 5 There's agreement that the defendant is in  
violence or 6 history category I. Does the government have information  
7 the defendant used violence or credible threats of  
8 possessed a firearm or other dangerous weapon or induced  
another person to do so in connection with the offense?  
9 MR. BLANCHE: No, your Honor.  
10 serious 10 THE COURT: Did the offense result in death or  
leader, 11 bodily injury to any person?  
in a 12 MR. BLANCHE: No, your Honor.  
13 THE COURT: Was the defendant an organizer,  
14 manager or supervisor of others in the offense, or engaged  
15 continuing criminal enterprise?  
16 MR. BLANCHE: No, your Honor.  
17 THE COURT: Did the defendant truthfully provide  
to 18 the government all information and evidence that it has  
19 concerning the offense or offenses that were part of the  
same 20 course of conduct or common scheme or plan with the  
offense of 21 conviction?  
22 MR. BLANCHE: Yes.  
23 THE COURT: Thank you. I find that the defendant  
does 24 qualify for the safety valve provision of the law.  
offense 25 The presentence report also concluded that

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2         level 25 applied in criminal history category I. I've  
3         reviewed  
4         the report carefully, the parties' submissions, and I  
5         adopt  
6         that determination as my own.  
7                   I have a submission from the government, a  
8         sentencing  
9         memorandum dated January 30th. Did the government file  
10        that  
11        with the Clerk of the Court?  
12                  MR. BLANCHE: Yes, your Honor.  
13                  THE COURT: Thank you.  
14                  I received at midday today a submission from  
15        Mr. Garzon with letters of reference and other documents  
16        for  
17        the defendant. Mr. Garzon, have you filed your submission  
18        with  
19        the Clerk of the Court?  
20                  MR. GARZON: No, your Honor. I did submit a copy  
21        to  
22        Mr. Blanche this afternoon as well, and just a copy that I  
23        submitted to your clerk at midday today, your Honor. I  
24        have  
25        not filed an ECF yet or with the general clerk of the  
Court,  
1         your Honor.  
2                  THE COURT: Do you need another copy of the  
3         procedures  
4         for doing that?  
5                  MR. GARZON: Judge, I did have some problem  
6         filing it  
7         earlier this week with my ECF in the office.  
8                  THE COURT: We'll give you another copy of the  
9         set of  
10        procedures you're to follow.  
11                  MR. GARZON: Thank you, your Honor.  
12                  THE COURT: And I want you to make sure this is  
13        filed

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1 by Monday.

2 MR. GARZON: Yes, I will, your Honor.

3 THE COURT: Thank you. I'll hear from the  
government.

4 MR. BLANCHE: Your Honor, the government has  
nothing

5 to add beyond its letter of last week, unless your Honor  
has

6 any questions.

7 THE COURT: Thank you.

8 Mr. Garzon?

9 MR. GARZON: Thank you, your Honor.

10 Your Honor, I am asking the Court to consider a  
11 sentence below the recommended guideline range, Judge. We

have

12 no objections to the information contained in the

presentence

13 investigation, Judge. However, I've reviewed the report

and

14 the addendum as well, and I understand, Judge, that the  
15 probation department recommends a sentence of 57 months,

that

16 being the low guideline range, based on the offense level

of

17 25, your Honor. We concur with that offense level, your

Honor.

18 I would ask the Court, though, however, your

Honor, to

19 consider a sentence of a lesser range for Mr. Nunez,

Judge,

20 based on the personal circumstances related to the case

itself

21 and relating to Mr. Nunez's personal circumstances as

well,

22 Judge. If I could just point those out to the Court, your  
23 Honor. It's indicated in the probation report, your

Honor,

24 with regard to the information surrounding Mr. Nunez's

25 involvement in this particular matter, more importantly,

Judge,

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1 that being Mr. Nunez is a criminal history category I.  
2 Judge, as the report reflects, he has really  
never had  
3 any contact in this kind of conduct. He had one minor  
4 situation, Judge, that resulted in dismissal for having  
5 improper plates on his vehicle, Judge, but certainly never  
any  
6 kind of conduct relating to controlled substances, whether  
that  
7 be personal use or certainly not trafficking controlled  
8 substances, Judge. The report reflects, Judge, Mr. Nunez  
was  
9 not a user of controlled substances, Judge.  
10 But I would just suggest to the Court, Judge,  
that  
11 it's consistent with the information provided by the  
agents  
12 that conducted this investigation, your Honor, that he was  
13 approached by someone that was a cooperating witness, your  
14 Honor, and that he agreed knowingly and willfully, Judge,  
to  
15 participate in these two transactions that he is charged  
with  
16 here, your Honor.  
17 I would just ask the Court to consider the fact  
that  
18 Mr. Nunez is not alleged to be, Judge, a person who is  
19 previously known to be a drug trafficker or someone that  
had  
20 been -- has a record of engaging in this type of conduct,  
21 Judge. In the government's memorandum, Judge, it does  
state  
22 that their position is not that this would have been a  
23 transaction or an incident where it could be considered an  
24 aberrant incident to Mr. Nunez. However, Judge, I would  
25 suggest to the Court that based on the lack of any prior

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Nunez 1 criminal conduct, Judge, it seems consistent with Mr.  
2 participating in this particular incident, Judge, at the  
3 inducement perhaps of the cooperating witness; although he  
4 admits and takes responsibility, Judge, for having agreed  
to 5 having been the person to supply the cooperating witness  
with 6 the heroin and subsequently, Judge, with the cocaine, with  
the 7 crack cocaine that was the subject of the criminal  
conduct, 8 your Honor.  
9 THE COURT: I want to make sure I understand you,  
10 Mr. Garzon. Are you saying that the only drug sales that  
your 11 client ever participated in are the sales of 35 grams of  
heroin 12 to -- in connection with that confidential informant, 70  
grams 13 of heroin in connection with that same person and then the  
14 purchase of the crack cocaine? Are you saying that's it?  
15 MR. GARZON: Judge, I'm not representing to the  
Court 16 that I would have any information as to whether those were  
the 17 only transactions that Mr. Nunez was ever involved with.  
What 18 I'm suggesting to the Court, your Honor, is that the lack  
of 19 any prior criminal history seems to indicate that Mr.  
Nunez, 20 this is the first time that he was ever involved in a  
criminal 21 case. He has no prior history, Judge.  
22 I would ask the Court to consider the fact that  
the 23 probation report confirms, your Honor, that Mr. Nunez, as  
far 24 as the investigation is concerned, has been a gainfully  
25 employed person, your Honor. He's lived with his family.  
He

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2 recently                 supports three children, your Honor, right now that he  
3 children,                 has; yes, a three-month old child, two other minor  
4 support.                 your Honor. He is not under any obligation for child  
5                         I would ask the Court to consider, Judge, these personal  
6 certainly                 circumstances which seem to indicate that Mr. Nunez  
7 history                 is not a person that was engaged in any prior criminal  
8 with                     or conduct that we know of, your Honor.  
9 sentence                 So I'm asking the Court to balance that, Judge,  
10 that                     your Honor's decision as to what would be a reasonable  
11 terms                     pursuant to the 3553 factors, your Honor. I understand  
12 protect                 the Court has to consider whatever it deems necessary in  
13 your                     of the actual offense conduct, your Honor, the need to  
14 has                         protect the community from any further criminal conduct of the  
15 particular             defendant. And the reason that I'm pointing that out,  
16 engaged in             Honor, is I believe it's consistent to say that Mr. Nunez  
17                         not been a danger to the community, apart from this  
18                         case that we're aware of, Judge, than the conduct he  
19                         this particular case. This is the argument I'm asking the  
20                         Court to consider, your Honor.  
21                         Again, your Honor, more importantly, I'd like to  
22 Honor.                 emphasize to the Court his personal background, your  
23 the                         That is, the closeness that he has with his family, Judge,  
24 your                     minor children that he is presently supporting. The fact,  
25 here,                     Honor, that he has -- he is gainfully employed, it states  
he's a                     Judge, that they verified his employment, Judge, because

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Court 1 member of the carpenter's union, Judge. So he does have,  
2 Judge, certainly positive factors, your Honor, that the

below 3 could take into consideration in fashioning the sentence,  
4 Judge.

out 5 I'd ask the Court to consider, Judge, a sentence  
6 the guideline range, for the factors which I just pointed  
7 to the Court.

you 8 THE COURT: Thank you.  
9 MR. GARZON: That would be all. Thank you, your  
10 Honor.

of 11 THE COURT: Mr. Nunez, I'll hear anything that  
12 have to say to me in connection with your sentence.

three, 13 THE DEFENDANT: Yes, your Honor.  
14 I would like to say I'm sorry for the government

that 15 the United States. I'm sorry for my family, and I have  
16 for the mistake I did. I would like to say for you to be  
17 concerned on your best for my -- for my sentencing. So

18 would be all, your Honor. Thanks.

there is 19 THE COURT: Mr. Nunez, I do not believe that  
20 any need to sentence you at any point higher than the low

end 21 of the guidelines range here. I've considered the  
22 Section 3553(a) factors and find the sentence of 57

months' 23 imprisonment would be reasonable in the circumstances;

that it 24 would provide sufficient punishment to you for your drug  
25 dealing. It would provide adequate general deterrence for

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1 others who might be tempted to pursue that kind of  
activity,  
2 and it would send a clear message to you and provide  
sufficient  
3 individual deterrence to convince you not to resume these  
4 activities.  
5 And I'm going to impose a term of supervised  
release  
6 of five years to follow the term of imprisonment with the  
7 following special conditions: That you report to the  
probation  
8 office in the district to which you are released within 72  
9 hours of release from custody; that you not commit another  
10 federal, state or local crime; that you not illegally  
possess a  
11 controlled substance; that you submit to the regular drug  
12 testing program; that you are prohibited from possessing a  
13 firearm or other dangerous weapon; that you cooperate in  
the  
14 collection of DNA as directed by the probation officer;  
that  
15 you comply with the standard conditions of supervised  
release;  
16 that you submit to the regular program in terms of a  
reasonable  
17 search by the probation officer; that you be supervised by  
the  
18 district of your residence; and that you pay a special  
19 assessment of \$100. I decline to impose a fine, finding  
that  
20 you would be unable to pay one, given your financial  
21 circumstances.  
22 Counsel, is there any legal reason not already  
argued  
23 to me why I cannot impose the sentence I've described as  
24 stated?  
25

MR. BLANCHE: No, your Honor.

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1 MR. GARZON: No, your Honor.  
2 THE COURT: I order the sentence I have described  
on  
3 the record to be imposed as stated.  
4 I believe there's an underlying indictment.  
5 MR. BLANCHE: Your Honor, the government moves to  
6 dismiss any open counts against the defendant now.  
7 THE COURT: That application is granted.  
8 Mr. Nunez, I need to advise you of your right to  
9 appeal. I know of no ground for an appeal. You entered a  
plea  
10 of guilty here. You signed a guideline stipulation  
waiving  
11 your right to appeal in certain respects, but nonetheless,  
I'm  
12 required to advise you of the following: If you are  
unable to  
13 pay the cost of an appeal, you may apply for leave to  
appeal  
14 informa pauperis. Any notice of appeal must be filed  
within  
15 ten days of the judgment of conviction.  
16 You may be seated.  
17 Mr. Garzon, did you have an application?  
18 MR. GARZON: Judge, I would ask the Court to  
permit  
19 Mr. Nunez to remain at liberty as recommended by the  
probation  
20 report, Judge. He is a good candidate for surrender,  
Judge,  
21 and I would ask the Court to schedule a date for his  
surrender,  
22 Judge.  
23 THE COURT: I'm going to permit the defendant to  
24 surrender by March 20th at 2:00 p.m. with the marshals in  
this  
25 courthouse, if he has not already received notice as to  
his

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1 designated facility and date of self surrender. A failure  
to  
2 surrender as required to serve this sentence could subject  
the

3 defendant to additional criminal penalties.  
4 Do you understand that, Mr. Nunez?  
5 THE DEFENDANT: Yes, your Honor.  
6 THE COURT: Counsel?  
7 MR. GARZON: Thank you, your Honor.  
8 MR. BLANCHE: Thank you, your Honor.  
9 THE COURT: Thank you.  
10 (Adjourned)

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